

IN THE  
SUPREME COURT OF APPEALS OF WEST VIRGINIA  
AT CHARLESTON  
NO. 34154

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BUILDERS' SERVICE AND SUPPLY COMPANY,  
Plaintiff Below, Appellee,

vs.

TAYLOR COUNTY CIRCUIT COURT  
CASE NO. 03-C-63

CHRISTAL M. DEMPSEY, A.K.A  
CHRISTAL M. SMITH, AND  
CLARK SINCLAIR, SHERIFF  
OF TAYLOR COUNTY, WEST VIRGINIA,  
Defendants and Third-Party  
Plaintiff Below,

vs.

EDWARD CHARLTON, DBA  
CHARLTON CONSTRUCTION,  
Third-Party Defendants Below,  
Appellees

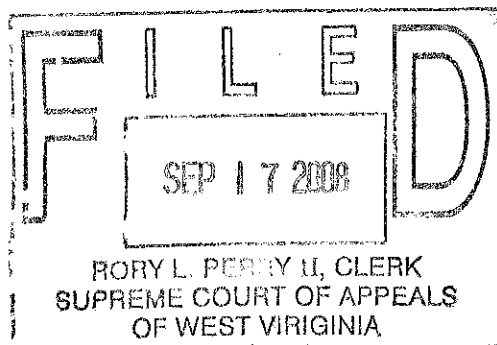
Christal M. Dempsey Smith, Appellant

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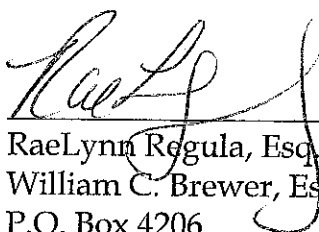
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**APPELLANT'S REPLY BRIEF**

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Comes now the Appellant, Christal M. Dempsey, a.k.a. Christal M. Smith (hereinafter Ms. Smith), and provides her Reply to the Brief of Appellee as follows:

I.

REPLY ARGUMENT

1. The Circuit Court of Taylor County abused its discretion by refusing to hear Ms. Smith's Motion to Reconsider Order Denying Motion to Reinstate when sufficient grounds of good cause existed during the period of inactivity to vacate its prior ruling.

On February 17, 2006, the above-styled civil action was dismissed pursuant to Rule 41(b) of the West Virginia Rules of Civil Procedure, being that there had been no order or proceeding for more than one year and no motions were filed alleging good cause why the action should not be dismissed. Thereafter, Mr. William C. Brewer, of Brewer & Giggenbach, PLLC, filed a Notice of Appearance and a Motion to Reinstate, pursuant to Rule 41(b) of the West Virginia Rules of Civil Procedure. By Order entered March 21, 2007, the trial court denied Ms. Smith's Motion to Reinstate without a hearing on the motion. Thereafter, on or about June 13, 2007, Ms. Smith filed a Motion to Reconsider Order Denying Motion to Reinstate, pursuant to Rule 60 of the West Virginia Rules of Civil Procedure. By Order entered on July 11, 2007, the trial court denied the motion for reconsideration, without a hearing on the matter. Ms. Smith then filed her Petition for Appeal in this matter on November 9, 2007. Ms. Smith recognizes that this Court has provided that "[a]n appeal of the denial of a Rule 60(b) motion, however brings to consideration for review only the order of denial itself and not the substance supporting the underlying judgment nor the final judgment order." Toler v.

Shelton, 157 W.Va. 778, 784, 204 S.E.2d 85, 89 (1974). As stated in Ms. Smith's Brief, this appeal stems from the trial court's dismissal of her Motion to Reconsider Order Denying Motion to Reinstate, as it has been timely filed.

"A motion to vacate a judgment made pursuant to Rule 60(b), W.Va. R.C.P., is addressed to the sound discretion of the court and the court's ruling on such motion will not be disturbed on appeal unless there is a showing of an abuse of such discretion." Id. "Our review for abuse of discretion necessarily entails some degree of consideration of the underlying claims presented to the lower court to determine whether the lower court abused its discretion in denying the Appellant's motion for reconsideration." Law v. Monongahela Power Company, 210 W.Va. 549, 556, 558 S.E.2d 349, 356 (2001). "A court, in the exercise of discretion given it by the remedial provisions of Rule 60(b), should recognize that the rule is to be liberally construed for the purpose of accomplishing justice" and "designed to facilitate the desirable legal objective that cases are to be decided on the merits." Toler v. Shelton, 157 W.Va. 784-785, 204 S.E.2d 85, 89

Judge Moats abused his discretion when he refused to allow Ms. Smith a hearing on her Motion to Reconsider Order Denying Motion to Reinstate, which was filed pursuant to Rule 60(b)(6) of the West Virginia Rules of Civil Procedure, though not specifically set forth therein, wherein Ms. Smith sought relief for any other reason justifying relief from the operation of the judgment. As a result of the trial court denying Ms. Smith a hearing, this Court has no transcript of the proceeding to review to

determine what evidence Judge Moats considered and what weight he gave to the evidence considered.

This Court in Bess v. Berger, remanded a case to the Circuit Court of Kanawha County, when the circuit court judge refused a motion for relief from a final order filed pursuant to Rule 60(b) of the West Virginia Rules of Civil Procedure, without a hearing. Bess v. Berger, 203 W.Va. 662, 510 S.E.2d 496 (1998). In Bess, this Court referred to Strobridge v. Alger, wherein it was "compelled to remand that case given the lack of any reviewable rulings on the Rule 60(b) motion from which we could make our determination of whether the lower court had abused its discretion in denying the requested Rule 60(b) relief. Id. citing Strobridge v. Alger, 184 W.Va. 192, 195, 399 S.E.2d 903, 906 (1990). As a result of the trial court in Bess not conducting a hearing on the Rule 60(b) motion, this Court remanded the matter and instructed the circuit court to hold an actual hearing on the merits of the Rule 60(b) motion for relief. Id. In the case at hand, Ms. Smith was not provided with an opportunity to offer relevant information in support of her position, given that no hearing was held. Further, a hearing provides the court with a mechanism to obtain the necessary facts on which to make an informed decision on the motion pending before it. If no hearing is held, there is no basis on which this Court can determine what fact motivated the trial court to make its decision.

In filing her Motion to Reconsider Order Denying Motion to Reinstate, Ms. Smith, is not, as the Appellee argued, simply requesting that the trial court change its mind. In the trial court's Order Denying Motion to Reinstate entered on March 31, 2007,

the trial court's order specifically provides that "Christal M. Smith filed an unrelated action in this Court on February 23, 2005 in Case Number 05-C-17. The Court dismissed that case by Order entered December 7, 2006, as a result of inactivity for a period of more than one year under Rule 41(b) of the West Virginia Rules of Civil Procedure." (See Order Denying Motion to Reinstate). Ms. Smith then filed her Motion to Reconsider Order Denying Motion to Reinstate on June 13, 2007, wherein Ms. Smith addressed the trial court's apparent concern that she had filed suit which was ultimately dismissed under Rule 41(b) by setting forth those other lawsuits which she was and is a party to and her pursuit of those claims. Specifically, Ms. Smith provided that she filed a personal injury suit, Civil Action No. 05-C-80 in Taylor County, which Judge Moats was assigned to, and which was dismissed pursuant to a settlement agreement. Additionally, Ms. Smith informed the trial court that she had other matters pending in Monongalia and Marion Counties, which are being actively prosecuted at this time to reassure the trial court that Ms. Smith was not in the habit of filing suit and failing to pursue her claims, given that the trial court called attention to the civil action which it had dismissed for failure to prosecute. Further, in Ms. Smith's motion for reconsideration, Ms. Smith specifically requested that the trial court set a hearing on the motion.

In Strobridge, this Court held that "[w]here a Rule 60(b) motion is made to set aside a judgment and there is a conflict as to the facts on whether there is a ground to set aside judgment, the trial court should hold a hearing to resolve the disputed facts

and make some findings relative thereto.” Strobridge v. Alger, 184 W.Va. 192, 194, 399 S.E.2d 903, 905 (1990). Though Ms. Smith asserts that she has demonstrated good cause for the period of inactivity, it certainly appears that the trial court disputed that fact, given that it took it upon itself to look into Ms. Smith’s past civil filings. As a result thereof, the hearing which Ms. Smith requested, but which was denied, constitutes an abuse of discretion on the part of the trial court.

2. The Circuit Court of Taylor County abused its discretion by failing to reinstate Ms. Smith’s Counterclaim and Third-Party Claim as Ms. Smith has demonstrated good cause for the period of inactivity.

As previously stated above, on February 17, 2006, the above-styled civil action was dismissed pursuant to Rule 41(b) of the West Virginia Rules of Civil Procedure. The Appellee has argued that Ms. Smith has failed to establish how she fulfilled her duty to monitor her case. Prior to the entry of the Dismissal Order, the last activity in the court file was Mr. Anderson’s Motion to Withdraw as Counsel, filed on October 6, 2004, and the subsequent Order entered by the trial court on November 14, 2004, denying Mr. Anderson’s motion. After a hearing held on November 4, 2004, and by Order entered November 15, 2004, the trial court denied Mr. Anderson’s motion to withdraw. In that Order the trial court indicated to counsel that if Ms. Smith desired “to have new counsel, she should hire new counsel and that counsel should file a Notice of Appearance.” (See Order Denying Counsel’s Motion to Withdraw). Ms. Smith informed Mr. Anderson that she still wanted him to continue to represent her interest in this matter and as a result there was no need for Ms. Smith to seek or employ new counsel.



Ms. Smith was under the belief that Mr. Anderson was continuing to represent her throughout the period of inactivity, as Ms. Smith authorized Mr. Anderson to continue his representation of her as she did not feel the concerns raised in his Motion to Withdraw would prejudice her. Ms. Smith contacted Mr. Anderson several times during the approximate 1 year and 3 months period of inactivity to ensure that the Mr. Anderson was still representing her in regard to this case. Ms. Smith was never notified by Mr. Anderson that he would not continue to represent her after his motion to withdraw as counsel had been denied.

It is clear that subsequent to the trial court's Order Denying Counsels Motion to Withdraw, the attorney-client relationship between Ms. Smith and Mr. Anderson deteriorated and eventually ceased, though Ms. Smith did not consent to the termination of the relationship. Ms. Smith was never informed by her counsel that the trial court had sent out a Notice of Intended Dismissal of Action under Rule 41(b) or that the case would be dismissed if a motion was not filed alleging good cause why the action should not be dismissed. It was only after the trial court entered its Dismissal Order on February 17, 2006, that Mr. Anderson informed Ms. Smith that the case had been dismissed.

Additionally, Ms. Smith was injured in a car accident which occurred on October 29, 2004, in Monongalia County, West Virginia, where she sustained many injuries including short-term memory loss, migraines, torn muscles in her rib cage, whiplash, neck and back pain, hip dysfunction, bruises, nerve damage to her face, and panic

attacks. During the time of dormancy, Ms. Smith sought and obtained medical treatment for her injuries, which still continue to plague her today. The Appellee argues that Ms. Smith's car accident did not render her unable to engage in litigation, as she filed two lawsuits in Taylor County, West Virginia, Civil Action Nos. 05-C-17 and 05-C-80, and one lawsuit in Marion County West Virginia, Civil Action No. 05-C-272. It should be stated that Civil Action No. 05-C-272, in Marion County, stemmed from an August 29, 2003, car accident. This case was filed on August 26, 2005, almost two years after the date of the accident. Further, the first set of discovery in that matter was filed on March 28, 2006, more than one month after the above-styled case was dismissed by the trial court. Additionally, Civil Action No. 05-C-80, filed in Taylor County, West Virginia, stemmed from a November 1, 2003, car accident. Again, like the Marion County case, this Complaint was filed on November 1, 2005, two years after the date of the accident. Further, discovery in that case did not begin until June 29, 2006, more than four months after the above-styled case was dismissed by the trial court.

Prior to Ms. Smith's accident on October 29, 2004, she was negotiating with the insurance companies for the at fault parties, on her own behalf. Shortly after the October 29, 2004, accident, Ms. Smith found it was necessary to seek counsel given the injuries she had sustained in this accident and that as a result of her injuries, she was in need of help to attempt to make recoveries; thereafter, her counsel filed the above-referenced lawsuits in 2005. While Ms. Smith is no stranger to the litigation process, as the Appellee points out, Ms. Smith's has been diligent in litigating those personal injury

cases she has been involved in, namely Civil Action Nos. 05-C-80, in Taylor County, 05-C-272, in Marion County, and 06-C-657, in Monongalia County. In fact, Civil Action No. 05-C-80, filed in Taylor County and assigned to Judge Moats, has been settled and was removed from Judge Moats' docket.

This Court stated in Dimon v. Mansy, "[b]ecause of the harshness of the sanction, a dismissal with prejudice should be considered appropriate only in flagrant cases." Dimon v. Mansy, 198 W.Va. 40, 45, 479 S.E.2d 339, 344 (1996). "Although courts should not set aside default judgment or dismissals without good cause, it is the policy of the law to favor the trial of all cases on their merits." Hewerton v. Tri-State Salvage, Inc., 210 W.Va. 233, 236, 557 S.E.2d 287, 290 (2001), *citing* Syl. Pt. 2, McDaniel v. Romano, 155 W.Va. 875, 190 S.E.2d 8 (1972). "[D]ismissal based on procedural grounds is a severe sanction which runs counter to the general objective of disposing cases on the merit." Dimon v. Mansy, 198 W.Va. 45-46, 479 S.E.2d 344-345. Though the "determination whether the plaintiff has failed to move the case in a reasonable manner is a discretionary call for the circuit court." Id. at 198 W.Va. 45, 479 S.E.2d 344. This Court in Covington v. Smith, held that "[d]espite the discretionary nature of such a determination, reinstatement is nevertheless proper where the moving party demonstrates the existence of good cause for such relief." Covington v. Smith, 213 W.Va. 309, 316, 582 S.E.2d 756, 763 (2003). This Court held in Covington, that "[t]o assess whether a plaintiff has demonstrated good cause in a particular case requires the reviewing court to conduct a factual inquiry." Covington v. Smith, 213 W.Va. 322, 582

S.E.2d 769.

The Appellee asserts that in regard to Ms. Smith's Rule 41(b) Motion to Reinstate that she never requested a hearing. As set forth in Ms. Smith's Motion to Reconsider Order Denying Motion to Reinstate, prior to the filing of the Motion to Reinstate on February 16, 2007, Ms. Smith's counsel's office contacted Judge Moats' office to ask the court to set a hearing in the matter. The Judge Moats' office informed the undersigned's office that she would speak to Judge Moats and notify the undersigned's office as to the setting of a hearing. Once the Motion to Reinstate had been filed, the undersigned's office contacted Judge Moats' office to confirm the motion had been received and again inquired as to the setting of a hearing on the Motion. Again, Judge Moats' office informed the undersigned that Judge Moats would be consulted and the undersigned's office would be notified as to the setting of a hearing on the Motion.

The undersigned's office continued to contact Judge Moats' office to check on the status of a hearing on the Motion, but was always informed that Judge Moats needed to be consulted and notification would follow regarding a hearing. It was not until May 29, 2007, after many times being told by Judge Moats' office that he would need to be consulted and that notification would be provided regarding a hearing, when the undersigned was preparing a letter to send to Judge Moats regarding the status of a hearing on the Motion, was it discovered that Judge Moats had denied Ms. Smith's motion on March 21, 2007. A copy of this Order was not forwarded by the circuit clerk to the undersigned. In addition to the times which the undersigned's office spoke with

Judge Moats' office, several messages were left with Judge Moats' office, again inquiring as to a hearing on the Motion, but none of those calls were returned to the undersigned's office. (See Motion to Reconsidered Order Denying Motion to Reinstate). Appellee takes issue with the fact that Ms. Smith's Motion to Reconsider was not accompanied by a Notice of Hearing, but Ms. Smith was not able to notice a hearing when the undersigned's office could not get a date from Judge Moats' office, even though the Judge's office was aware that Ms. Smith sought a hearing on the matter.

Further, Ms. Smith provides that the trial court should have held a hearing on her Motion to Reinstate, as it is Ms. Smith's position that she has established good cause for the period of inactivity. As a result thereof, according to Dimon v. Mansy, the trial court should have shifted the burden to the defendants to show substantial prejudice, which would have necessitated a hearing, and has been further set out in Appellant's Brief.

## II.

### CONCLUSION

The Circuit Court of Taylor County abused its discretion by refusing Ms. Smith a hearing on her Motion to Reconsider Order Denying Motion to Reinstate and her Motion to Reinstate, when good cause has been established for the period of inactivity.

## III.


### PRAYER FOR RELIEF

WHEREFORE, for the foregoing errors, the Appellant, Christal M. Dempsey,

a.k.a. Christal M. Smith, by counsel, respectfully prays that this Honorable Court reverse the February 17, 2006, March 21, 2007, and July 11, 2007, Orders of the Circuit Court of Taylor County, West Virginia, and requests that this matter be remanded to the Circuit Court of Taylor County, West Virginia, for reinstatement of this civil action and adjudication of the claim upon its merits. Or in the alternative, the Appellant, Christal M. Dempsey, a.k.a Christal M. Smith, prays that this Honorable Court remand this matter to the Circuit Court of Taylor County, West Virginia, and require the Circuit Court of Taylor County, West Virginia, to hold a hearing on Ms. Smith's Motion to Reconsider Order Denying Motion to Reinstate.

BREWER  
&  
GIGGENBACH  
Attorneys at Law, PLLC  
Of Counsel

RESPECTFULLY SUBMITTED,  
CHRISTAL M. DEMPSEY, A.K.A  
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**CERTIFICATE OF SERVICE**

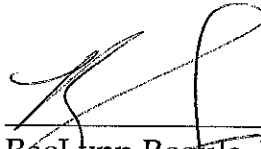
The undersigned does hereby certify that he served a true copy of the within **APPELLANT'S REPLY BRIEF** by placing a true copy of the same in the United States Mail, postage prepaid, on the 16<sup>th</sup> of September, 2008, upon the following:

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